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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 568

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION and FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS FLETCHER,
11th Floor Esperson Bldg.
Houston 2, Texas

C. HUEMAN LEWIS,
P. O. Box 1707,
Shreveport, Louisiana

RALPH M. CARSON,
18 Broad Street
New York, N. Y.

Attorneys for Petitioner
United Gas Pipe Line Company

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
(a) The proceedings before the Federal Power Commission	3
(b) The judgment of the Court of Appeals	6
Reasons For Granting The Writ	8
Point I—The Court of Appeals Has Decided Erroneously an Issue of General Importance Which This Court Has Not Settled But Should Determine In Holding That the Natural Gas Act Provides a Special Rule For Admeasuring Prices Paid an Affiliate For Gas Purchased	9
Point II—In Conferring Upon Customers Of a Natural Gas Company a Proprietary Interest In Its Properties and Facilities the Court Below Has Decided an Important Federal Question In a Manner Conflicting With Applicable Decisions of This Court	10
Point III—In Departing From the Standard of Review Enjoined by § 19(b) of the Natural Gas Act the Court Below Has Rendered a Decision in Conflict With Decisions of Four Other Circuits on the Same Principle	17
Point IV—In Creating This Innovation in Judicial Review Prejudicial to Correct Administrative Procedure For the Future the Court Below Acted Without Jurisdiction Because of the Failure of Respondent Mississippi to Raise the Question in the Commission	19
Conclusion	22

TABLE OF CASES

PAGE

Board of Public Utilities Commissioners v. *New York Telephone Company* 271 US 23 (1926) 16

Cities Service Gas Co. v. *Federal Power Commission* 155 F. 2d 694 (CA 10 1946), cert. denied 329 US 773 18

Colorado Interstate Gas Company v. *Federal Power Commission* 324 US 581 (1945) 10, 11

City of Detroit v. *Federal Power Commission* 230 F. 2d 810 (DC Cir. 1955), cert. denied 352 US 829 ..... 4, 8, 12, 13, 18, 20

City of Houston v. *Southwestern Bell Telephone Company* 259 US 318 (1922) 11, 12

Compania Mexicana de Gas S. A. v. *Federal Power Commission* 167 F. 2d 804 (CA 5 1948) 18

Dayton Power & Light Company v. *Public Utilities Commission* 292 US 290 (1934) 11, 12

Federal Communications Commission v. *RCA Communications, Inc.* 346 US 86 (1953) 14

Federal Power Commission v. *Colorado Interstate Gas Company* 348 US 492 (1955) 20, 22

Federal Power Commission v. *Hope Natural Gas Company* 320 US 591 (1944) 10, 11, 23

Federal Power Commission v. *Natural Gas Pipeline Company* 315 US 575 (1942) 10

Magnolia Petroleum Co. v. *Federal Power Commission* 230 F. 2d 785 (CA 5 1956), cert. denied 352 US 968 20

Michigan Consolidated Gas Co. v. *Federal Power Commission* 203 F. 2d 895 (CA 3 1953) 18

Michigan Consolidated Gas Co. v. *Federal Power Commission* 240 F. 2d 904 (CA 3 1957) 18

Montana Dakota Utilities Co. v. *Federal Power Commission* 160 F. 2d 392 (CA 8 1958), cert. denied 335 US 853 18

PAGE

Panhandle Eastern Pipe Line Company v. *Federal Power Commission* 232 F. 2d 467 (CA 3 1956) . . . 20

United Fuel Gas Company v. *Railway Commission of Kentucky* 278 US 300 (1929) 11, 12

OTHER AUTHORITIES

Carroll's Kentucky Statutes, 6th Ed. 1922, § 201e-5 . . 12

Federal Power Commission Opinion 269 . . . . . 4, 6, 19, 22

Page's Annotated Ohio General Code, 1926, § 614-12. 12

Natural Gas Act of 1938, 52 Stat. 821, 15 USC § 717 et seq. 2, 3, 8, 12, 14, 22

§ 4(e) 3

§ 5(a) 3–4

§ 19(b) 2, 6, 11, 17, 8, 20

United States Code, Title 28 § 1254(1) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 8, 1957 (App. 13a) and judgment upon its petition for rehearing entered September 19, 1957 (App. 18a) reversing the order of respondent Federal Power Commission[1] entered in Dockets G-1142 and G-2019 against Mississippi (R. 937, App. 55a) in so far as said order approved prices paid by United for gas purchased from its affiliate Union Producing Company and directing further hearings accordingly.

OPINIONS BELOW

The Commission issued an order (R. 937, App. 55a) modifying and, as modified, affirming the initial decision by the Presiding Examiner issued July 21 1955 (R. 807, App. 27a). The majority concurring and dissenting opinions in the Court of Appeals (not yet reported) styled *Mississippi River Fuel Corp.* v. *Federal Power Commission* are contained in the Appendix hereto (App. 1a, 13a, 18a).

JURISDICTION

The judgment of the Court of Appeals was entered July 8 1957 (App. 13a). All parties having filed petitions for rehearing, the judgment below was amended September 19 1957 as to the Part I of the opinion with which petitioner is here concerned. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), and Natural Gas Act §19(b).

QUESTIONS PRESENTED

1. In establishing the price properly allowable as an expense for cost of natural gas purchased by a natural gas company from a producer-affiliate, does the Natural Gas Act require departure from this Court's rule that the price be no higher than that determined by arm's-length transactions in a regulated business?

2. Does the Natural Gas Act give to purchasers or their customers any interest, legal or equitable, in the property or facilities of a natural gas company used to render service to such purchasers?

3. Does a court reviewing an order of the Federal Power Commission under § 19(b) of the Natural Gas Act have authority to reverse the Commission's order upon a

ground not reserved in the motion for rehearing of the party appealing?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21 1938, c. 556, 52 Stat. 821, as amended, 15 U. S. C. § 717 et seq.) are set forth in the Appendix filed herewith (pp. 22a to 26a).

STATEMENT

(a) *The proceedings before the Federal Power Commission.*

All of the stock of United (which is a natural gas company) and of Union Producing Company (*not* a natural gas company) is owned by United Gas Corporation (App. 3a, 28a).

On October 13 1948, the Commission *sua motu* instituted Docket G-1142, an investigation pursuant to Section 5(a) of the Act of all rates of United (R. 740-2). Mississippi was permitted to intervene (R. 749). On July 3 1952 (R. 901) United, pursuant to Regulations promulgated by Order 144, filed its Conversion Tariff, and as permitted by § 154.84 of such Regulations, included notice of increased rates to pipelines including Mississippi. After suspension, the increased rates became effective subject to refund (R. 1000). On November 26 1952, Docket G-1142 the Section 5(a) proceeding, and Docket G-2019 the Section 4(e) cases, were consolidated (R. 745). Other proceedings immaterial here were also consolidated.

After several hearings United and the Commission's staff agreed upon figures from the staff's investigation and conclusions in the Section 5(a) investigation (G-1142)

Mississippi declining to agree, the Commission, after oral argument, by opinion and Order *277* (R. 751-786) approved the settlement. It ordered a hearing on Mississippi's contentions and objections (R. 770-80; Paragraphs (I) p. 784, and (O) p. 785).

Mississippi excepted to Opinion *277*, objecting (R. 792) that prices paid for gas purchased from Union Producing Company (herein called *Union*) should have been determined by the fair field price method of the Commission's *Panhandle* decision (Opinion *269*), (later reversed by *City of Detroit* v. *Federal Power Commission* 1955, D. C. Cir. 230 F. 2d 810, cited by the court below). These objections were denied but a full hearing ordered (R. 798).

On such hearing the staff offered substantial evidence to support its proposed cost of service resulting from the Section 5(a) investigation (Docket G-1142) which United adopted (R. 2-3; 58-60; 165). The Examiner's decision issued July 21 1955 (R. 917), may be summarized as holding, with respect to the cost of gas bought by United from Union, that such prices were substantially less, both in the same districts of purchase and on an over-all basis, than the arm's-length prices United paid non-affiliated producers.

The same evidence showed that the prices paid to Union were *substantially less than those paid by nine natural gas companies, subject to Commission jurisdiction*, to producers for purchases in the same areas and fields in which Union's wells were located.[4] The demonstration made by the under-

[4]Exhibit 161, received at R. 334, is described at R. 329-335, and reflects the weighted average prices paid to producers for gas purchased by nine major pipe line companies. The information comes from Federal Power Commission annual reports including 745.11 Field Purchases, and 745.12 Gasoline Plant Outlet purchases on equivalent volume basis, which the witness testified gave in effect the field prices (R. 330). Annual reports are based upon jurisdictional operations, and contain the particular type of information the Com-

lying figures was of the most cogent character. It fell into three parts.

It showed *first* that for the years 1948-53 the price paid by United to Union was *less than* that paid by United to non-affiliated companies by 0.17 cents per mcf in 1948; by 0.75 cents in 1949; by 1.10 cents in 1950; by 1.0[illegible] cents in 1951; by 1.29 cents in 1952; and by 1.64 cents in 1953. It showed *second* that the prices paid by United to Union in the period were substantially below the average of prices per mcf paid by nine natural gas companies (including Mississippi River Fuel Corporation)[8], viz. by 1.35 cents per mcf in 1948, 1.49 cents in 1949, 1.52 cents in 1950, 1.37 cents in 1951, 1.05 cents in 1952 and 2.56 cents in 1953. Individual comparison shows greater differences. The evidence referred to shows *third* an even more revealing difference between the prices paid by United to Union and the higher prices paid by Mississippi to third party producers, in the period commencing 1950 when Mississippi began to purchase; viz. 5.82 cents per mcf less in 1950, 5.96 cents less in 1951, 4.90 cents less in 1952 and 5.20 cents less in 1953.

Such were the figures before the Commission concerning the prices paid to Union by United. They showed conclusively that no advantage was being taken of affiliation to the prejudice of consumers. The Commission took into consideration also the testimony of a United employee who had the duty to negotiate gas purchase contracts, and whom Mississippi called as a witness (R. 1061). His testimony showed in detail the policy of United to initiate contracts

[8] The nine natural gas companies, other than Mississippi River Fuel Corporation, are Arkansas Louisiana Gas Company, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Corporation, Texas Gas Transmission Corporation, Transcontinental Gas Pipe Line Company, Texas Illinois Natural Gas Company, and Trunkline Gas Company. These nine companies are not affiliates of or in any way connected with United. The record below not only fails to mention these nine companies but [illegible]

or amendments thereof with non-affiliated producers and then to extend the benefit of the terms and prices to all other non-affiliated producers in the same field and to the affiliate Union Producing Company (R. 324-6). This policy has allowed United constantly to renew the vast majority of its contracts, and has been lauded by the Commission (R. 823-4).[*]

The Examiner noted Mississippi's concession that prices paid by United to non-affiliated producers were fair, just and reasonable (R. 862), and found that the method of valuing gas adopted in the Commission's Opinion 269 (*Panhandle*), as urged by Mississippi, would not serve to reduce the cost of gas purchased or reduce the rates to Mississippi (R. 864). He accordingly approved the cost of gas at the figure testified to by staff witnesses, which included the prices allowed for the gas purchased from Union Producing Company (R. 864).

The Commission, with modifications immaterial here, affirmed the Examiner's decision (R. 937). Mississippi's petition for rehearing still limited its claim expressly to alleged failure of proof to meet the Commission's *Panhandle* opinion (R. 955).

(b) *The judgment of the Court of Appeals.*

Mississippi filed a petition for review pursuant to Section 19(b) of the Act to set aside the Commission's order. The Commission appeared in defense of its order.

The Court of Appeals reversed the Commission's order approving the amounts paid by United to Union and directed inquiry into the increases over original prices paid by

[*]The Commission noted the estimate of recoverable reserves had risen from 2.3 trillion cu. ft. in 1930 to over 20 trillion cu. ft. as of July 1 1950 (R. 824). The decision at Docket G-8230, In the Matter of United Gas Pipe Line Company, recites the reserve figure increased from 20 trillion cubic feet as of July 1 1950, to over 24½ trillion cubic feet of gas at January 1 1955.

United to Union. On other issues, immaterial here, the majority affirmed the Commission, Judge Bazelon dissenting (App. 13a).

On the critical point, the court reasoned that if the initial contracts between Union and its producers some of which were wholly owned affiliates, were fair and reasonable, the advantage of their relatively low prices would "belong" in part to Union's customers, and thus to the customers of its affiliate United, and could not be shunted by a mere intra-corporate entry into accounts available to stockholders only, so that a comparison of such prices with prevailing prices would not "sufficiently justify the transactions" (App. 5a). It stated it did not require a "full blown inquiry" into Union's rates, though subsequent developments might or might not indicate such a necessity (App. 6a).

In this July 8 opinion the court predicated its conclusion upon the erroneous statement that Union had given price increases to "wholly-owned and partly-owned affiliate producers" which increases were reflected in United-Union prices (App. 6a). The court erroneously indicated that Union purchased from third parties and that Union was engaged in transmission. United's petition for rehearing developed the error of this factual basis and showed that the decision of July 8 was predicated on a non-existent situation. It showed that Union was engaged only in the business of drilling for and producing oil, gas and other minerals; that it purchases no gas from outsiders and has no producers, affiliated or non-affiliated, from which any of the gas sold to United was acquired; and that the suggested complexities of "mere bookkeeping" or "intra-corporate system adjustments" simply did not exist.

Mississippi and the Commission also petitioned for rehearing, the petition of the Commission (R. 1076) being in general similar to that of United.

By supplemental opinion dated September 19 1957 the court sought to correct the errors of fact above mentioned but retained the conclusions based thereon. It directed the Commission to inquire into the factual justification for the price increases upon the same course of reasoning followed in *City of Detroit*, 230 F. 2d 810, cert. den. 352 U. S. 829, further directing that the Commission must determine that the increases were justified "by reason of Union's costs or by reason of some other stated end of the Natural Gas Act"; the Commission must ascertain that they were not mere bookkeeping or intra-corporate-system adjustments". Again the court said that it did not hold that a "full blown" inquiry into Union's rates was necessary.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to consider whether the Natural Gas Act provides a rule for admeasurement of prices paid an affiliate for gas purchased different from the general rule governing payments to affiliates heretofore established by this Court's decisions in similar circumstances. The decision below squarely presents broad and highly important questions of governance of administrative discretion of the Commission, with substitution of judicial dictate, contrary to the decisions of this Court. Petitioner accordingly submits that the Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court, and has decided them in a way which will have such extreme effects on the administration of a vital federal statute as to call for review by this Court.

The Act vested the Commission, as statutory agent of Congress, with broad discretion of expert judgment, carrying presumption of validity. This Court has been careful to preserve the Congressional purpose by repeated declarations that the *result reached, not the method employed,*

controls, even though the method employed should contain intrinsities. The court below did not heed these guides to determine whether the total effect was unjust and unreasonable. It reversed solely because it disagreed with the exercise of discretion by the Commission in the method employed. Petitioner submits that the decision invades a province which this Court's decisions declare is reserved by the Act solely to the Commission. Petitioner submits that these matters all furnish additional appropriate reasons for granting the review requested, and a definitive settlement thereof by this Court.

POINT I

THE COURT OF APPEALS HAS DECIDED ERRONEOUSLY AN ISSUE OF GENERAL IMPORTANCE WHICH THIS COURT HAS NOT SETTLED BUT SHOULD DETERMINE IN HOLDING THAT THE NATURAL GAS ACT PROVIDES A SPECIAL RULE FOR ADMEASURING PRICES PAID AN AFFILIATE FOR GAS PURCHASED.

It is apparent that the court was moved in the original decision to require a further hearing because it considered Union to be at the apex of two legs: one consisting of a corporate chain of wholly-owned producer affiliates which by intra-corporate entries had transferred gas up such corporate chain into Union; the other, acquisitions by Union of gas by a series of purchases from third party producers. Further, that the sale by Union to United was of the gas so acquired from such two sources without any disclosure to or inquiry by the Commission of such assumed underlying transactions, and at prices agreed on between Union and United without regard to such underlying transfers and purchases. The court was thus led to say:

> "We think the Commission must at least inquire into the reality of the price increases paid by Union to *its wholly-owned and partly owned affiliate producers,*

> which increases were in part reflected in the United Union prices. By this we mean that to include the increased prices in the costs of United the Commission must at least determine that the increases had sufficient factual economic justification. It must ascertain that they were not mere bookkeeping or intra-corporate system adjustments. We must remand the case *for that inquiry*." (Emphasis supplied). (App. 60).

Neither the original nor the supplemental opinion declares the result or total effect of the Commission's rate to be unjust and unreasonable. Instead, the court finds fault with the method employed by the Commission, holding that the Commission cannot test the reasonableness of the prices paid an affiliate by comparison with prices being paid by regulated natural gas companies subject to the Commission's jurisdiction and in arm's length transactions. Thereby the court has invaded an area excluded from its consideration, for if the result reached by the Commission be just and reasonable, "judicial inquiry under the Act is at an end."[1]

Here the Commission adopted a method of measurement which upon the evidence adduced it found resulted in a reasonable and appropriate price. Comparison with prices paid by regulated natural gas companies approved by the Commission produces a reasonable price, adequate to protect the interests of both the consumer and the producer. The ultimate decision reached by the Commission, reversed by the Court of Appeals, was nowhere shown to entail any prejudice to the ultimate consumer.

The Act does not provide a formula for the Commission to follow.[2] It confines the discretion to choose a

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[1] *Federal Power Commission v. Hope Natural Gas Company*, (1944) 320 U.S. 591, 602, 603; *Federal Horse Commission v. Natural Gas Pipeline Company* (1942) 315 U.S. 575, 586.

[2] *Colorado Interstate Gas Company v. Federal Power Commission* (1945) 324 U.S. 581, 589.

formula only by the statutory standard of "just and reasonable." Congress vested the Commission with the legislative power to measure rates, circumscribed only by the ambit of statutory purpose. This Court has held that judicial inquiry into a rate order is limited to the question whether the order viewed in its entirety and measured by the end results meets the requirement of the Act. *Federal Power Commission* v. *Hope Natural Gas Company* (1944) 320 US 591; *Colorado Interstate Gas Company* v. *Federal Power Commission* (1945) 324 US 581.

This the court did not test, but disagreed with the method employed by the Commission, even dictating the method it required the Commission to follow.

Section 19(b) of the Act provides that the Commission's findings of fact, if supported by 'substantial' evidence, shall be conclusive. The court nowhere found the evidence of the Commission's staff and United to be less than substantial, it only declared the Commission's method impermissible. Even Mississippi conceded that the prices used as the standard of comparison were not above a level which was fair, just and reasonable for others (R. 862).

This Court has laid down principles to govern payments by a regulated company to an affiliate. See *United Fuel Gas Company* v. *Railway Commission of Kentucky* (1929) 278 US 300; *City of Houston* v. *Southwestern Bell Telephone Company* (1922) 259 US 318; *Dayton Power & Light Company* v. *Public Utilities Commission* (1934) 292 US 290. Mr. Justice Cardozo, in *Dayton*, sums up the rule as follows (p. 308):

> "Even so, the burden of proof was on the buyer of the gas to show that in these transactions with the affiliated seller the price was no higher than would fairly be payable in a regulated business by a buyer unrelated to the seller and dealing at arm's length."

The Ohio statutes involved in *Dayton*, and the Kentucky statutes involved in *United Fuel Gas* provide that rates and

charges of public utilities shall be just and reasonable." The Act prescribes the same regulatory standard. Thus the court below was not justified in refusing to follow the prescription of those cases declared by this Court to meet the same standards contemplated by the Act.

Over and above Mississippi's concession on the point (p. 6 above) the evidence showed without dispute that the prices paid by United to Union were markedly less than the prices paid by other natural gas companies (including Mississippi) for gas purchased in arm's-length transactions from unaffiliated producers, all under the regulatory eye of the Commission (see pp. 4-5 above). Thus the decision below is in square conflict with *Dayton*, *United Fuel Gas*, and *City of Houston*. The Act nowhere prescribes any rule of measurement contrary to that declared in *Dayton*. Nor did the court below point to any provisions requiring application of a rule different from that which this Court has declared appropriate for purchases from an affiliate.

The court below directed the Commission to make a new inquiry under the "same course of reasoning" it followed in *City of Detroit* v. *Federal Power Commission* (1955 D. C. Cir.) 230 F. 2d 810, cert. den. 352 U.S. 829 (App. 19a, 20a). There it had held that the "field price" was not "an adequate basis for bringing the resulting rates within the 'just and reasonable' standards of the Act" (p. 818). Describing the "field price" method, it said the Commission ". . . *computed* a 'field price' for the gas obtained from those sources, based upon the 'weighted average arm's length prices' established by *federally uncoordinated* bargaining for similar gas in the fields. It then multiplied the volume of Panhandle's production by that 'field price' and included the result in Panhandle's operating expenses as an amount to be recovered through

[8] Section 614-12, Page's Annotated Ohio General Code, 1926; Section 2061e-5, Carroll's Kentucky Statutes, 6th Edition, 1922.

the rates. At the same time the Commission excluded from the rate base the cost of the properties which produced this gas and excluded from recoverable operating expenses the cost of producing." (p. 813; emphasis supplied)

But the court cannot by the fiat of an order force this case into so unsuitable a mould as that of the *Detroit* case.

(a) Here the Commission used *actual* prices paid by United to Union, not a theoretical price *computed*, as in that case.

(b) Here the prices used as the test of reasonableness were federally regulated as well as the products of arm's-length bargaining—a far cry from the "federally unregulated bargaining" of *Detroit*.

(c) Here, the data used came from records and reports of the Commission gathered from its statutory experience, whereas such was not the case in *Detroit*. The Commission thus had the discipline and tutoring of its own experience gained from filings pursuant to its own regulations.

(d) Here, the Examiner and the Commission declared the "field price" method which *Detroit* condemned, was not employed in this proceeding (R. 863), and the undisputed record confirms.

(e) Here, Mississippi repeatedly conceded that the prices used as the objective standard by the Commission were at a level which was just and reasonable (R. 848, 862).

(f) Lastly, Mississippi did not contend to the Examiner or the Commission "that the 'rate base' approach to Union's production should be applied here" (R. 863). On the contrary it insisted, without variation, that valuation of Union's gas as a commodity was the sole permissible method to test the amount allowable to United for its purchase. In the court below, for the first time it changed to the "rate base" and "cost" approach.

In short, the court has ordered the Commission to pursue a course contrary to the admonition of this Court in *Federal Communications Commission* v. *RCA Communications, Inc.* (1953) 346 US 86, 90:

> "To restrict the Commission's actions to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specializing, by insight gained through experience, and by more flexible procedure'. *Far East Conference* v. *U. S.*, 342 US 570, 575."

The court's order invades the Commission's unrestricted discretion to avail of the "insight" gained through the accumulated experience of regulation under the Act and from the flexibility of investigation which the guarantee of that discretion insured. The Court of Appeals has sought to require "tangible evidence" which it considers "appropriate" for its judicial consideration. It is submitted this is an interference with administrative procedure of so substantial a nature as to stultify the powers of the Commission and cripple its ability to regulate.

The court below noted the stress by the Commission upon the inadvisability of a full-blown inquiry into Union's rates in this proceeding and seems to agree, being at pains both in the original and in the supplemental opinion to declare that it does not hold "that a full-blown inquiry into the rates of Union is necessary" (App. 6a, 21a). Yet the court's direction that the Commission must proceed to determine costs nullifies the administrative process. If indeed a "full-blown inquiry into the rates of Union" is not necessitated by the holding below, then it will be a question constantly vexed in the Commission and in subsequent appeal *how much less* than a full-blown inquiry

will satisfy the new rule now laid down. This question of measure and degree is susceptible of indefinite controversy. No doubt the possibility will be fully exploited by intervenors. The administrative problems presented will be multiplied by the length of time consumed, since the Presiding Examiner's opinion of 1955 already reflects extensive controversy as to the selection of the calendar year 1952 as the test period (R. 820-46). Undoubtedly the remission of the record to the Commission under the new rule will give fertile opportunity for renewal and intensification of this controversy about the test period. Even under the original conditions the Presiding Examiner was led to observe in his summary (R. 846):

> "It is fair to observe that it would not be possible for the Commission to function unless it afforded its Staff time to analyze the data filed by a company in connection with an increased rate filing or to analyze the books and records of the company in an investigation. The hearings themselves are exceedingly broad in scope, usually involve highly complex problems, and require a great deal of time for preparation as well as for actual hearing. It has been contended that delay is, in general, far more costly to applicants than it is to the customer companies, particularly in times like the present." [Cf., Dougherty, Comments on the Regulatory Lag, 50 P. U. Fort. 631 (1952).] The contention to the contrary made here is not supported."

If cost determinations in like proceedings must be made, then there would never be any end to this and like proceedings, and the Commission would be entirely deprived of any flexibility of approach.

POINT II

IN CONFERRING UPON CUSTOMERS OF A NATURAL GAS COMPANY A PROPRIETARY INTEREST IN ITS PROPERTIES AND FACILITIES THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT.

In the original opinion, the lower court said: "If the initial contracts between Union and its producers (some of which were wholly-owned affiliates) were fair and reasonable the *advantage* thus created by their relatively low prices would *belong* in part at least to the customers of Union and thus to the customers of its affiliate United; . . ." (App. 5a; emphasis supplied).

In the supplemental opinion the quoted language was changed to read: "If the initial contracts between Union and United were fair and reasonable, the advantage thus created by their relatively low prices would *belong* in part at least to the customers of United; . . ." (App. 19a; emphasis supplied).

In this holding the court below is squarely in conflict with the pronouncement of this Court in *Board of Public Utilities Commissioners* v. *New York Telephone Company* (1926) 271 US 23, 32, that:

> "Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for services they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the Company."

Neither Mississippi nor its customers can acquire a proprietary right to a low rate.

Indeed, the quoted holding is in conflict with the holding in Part II of the original opinion in which the court affirmed the action of the Commission in rolling together the so-called "old" or "cheap" contract of 1929, and the so-called "new" or "high" contract of 1951. On that point the Commission in Opinion 277 noted that Mississippi asserted a right to two different contracts and rates because entitled to retain the benefit of a low rate of the "old" contract for the age of such contract, further claiming that performance gave Mississippi *"a proprietary right"* in the reserves thereunder and in the depreciation reserves accumulated over the years (R. 773-775). Rejecting this, the Commission declared that it had never recognized a "proprietary right or preferential advantage to anyone by reason of the terms of a contract or otherwise, where it might be claimed that such individual should be entitled to rates reflecting costs limited to specified facilities without regard for over-all costs reflecting system operations" (R. 778).

Having affirmed the Commission on that score, the court below nevertheless now conflictingly requires the Commission, contrary to its uniform policy, to accord to Mississippi and its customers the proprietary right of advantage said to arise from the "initial low rates."

POINT III

IN DEPARTING FROM THE STANDARD OF REVIEW ENJOINED BY § 19(b) OF THE NATURAL GAS ACT THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF FOUR OTHER CIRCUITS ON THE SAME PRINCIPLE.

As we have above made clear (pp. 4-5), the determination of the Commission and the Hearing Examiner, which the court below reversed, was supported by evidence of undisputed quality and substantial in bulk. There was

indeed no contravening evidence. The court below differed only upon the proposition, advanced by it in somewhat different circumstances in the *City of Detroit* case, that the law requires additional evidence of different nature from that which satisfied the Commission, notwithstanding failure of the court below to question the justness and reasonableness of the result attained.

In reversing, therefore, the court below seems to us with due deference to have departed from the clear statutory standard of §19(b) of the Act that "the finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive". This directive of Congress must apply to the Examiner's findings (8) and (9) as to the "just and reasonable amount for the total cost of service for United's entire system" and as to the "just and reasonable amount for cost of natural gas purchased by United" (R. 913-4).

In so departing from the standards of the Act the court below has created a conflict with the courts of appeals in four other circuits, indicated by their contrary decisions as follows:

Compania Mexicana de Gas S. A. v. *Federal Power Commission* 167 F. 2d 804, 806 (CA 5 1948);

Michigan Consolidated Gas Co. v. *Federal Power Commission* 203 F. 2d 895, 900 (CA 3 1953);

Michigan Consolidated Gas Co. v. *Federal Power Commission* 246 F. 2d 904, 908 (CA 3 1957);

Cities Service Gas Co. v. *Federal Power Commission* 155 F. 2d 694, 698, 699 (CA 10 1946), cert. denied 329 US 773;

Montana-Dakota Utilities Co. v. *Federal Power Commission* 169 F. 2d 392, 398, 400 (CA 8 1948), cert. denied 335 US 853.

POINT IV

IN CREATING THIS INNOVATION IN JUDICIAL REVIEW PREJUDICIAL TO CORRECT ADMINISTRATIVE PROCEDURE FOR THE FUTURE THE COURT BELOW ACTED WITHOUT JURISDICTION BECAUSE OF THE FAILURE OF RESPONDENT MISSISSIPPI TO RAISE THE QUESTION IN THE COMMISSION.

The rule of law adopted by the court below for its reversal of the Commission was nowhere invoked by Mississippi in the proceedings before the Commission, either originally or by petition for rehearing. As we have pointed out (p. 4 above) Mississippi in the proceedings before the Commission based its attack upon United's costs on the principles laid down by the Commission in Opinion 269 (*Panhandle*). The Presiding Examiner and the Commission addressed themselves to Mississippi's contention in this form, saying in part (R. 864):

> "The method of valuing gas employed in Panhandle if applied here would not serve to reduce cost of gas purchased and thus to reduce rates to Mississippi and consequently its objections on this score as to cost of gas purchased are without merit."

Even after the Examiner's opinion came down Mississippi followed the same line of attack. Its exceptions reasserted, unchanged, its *Panhandle* rule contention, saying (R. 922):

> "If a proper record is to be made to support the final rates recommended by the Examiner herein, additional evidence as to the 'fair field', 'market', or 'commodity value' for Union produced gas must be introduced in these proceedings."

Mississippi's petition for rehearing still took the same line (R. 955):

> "The Examiner in his Decision approved by the Commission admits that the *Panhandle* method was not used by United, the Staff, or by the Examiner. The sole test was whether the prices paid by United to Union were above the prices paid by United to non affiliated producers.
>
> "If a proper record is to be made to support the final rates recommended by the Examiner and approved by the Commission herein, additional evidence as to the 'fair field', 'market', or 'commodity value' for Union produced gas must be introduced in these proceedings."

Thus no ground whatever was reserved by Mississippi in its petition for rehearing which would cover the contention reviewed and adopted by the Court of Appeals herein. The Examiner correctly noted that Mississippi at no time contended "that the 'rate base' approach to Union's production should be applied here" (R. 863).

In its brief in the Court of Appeals, for the first time, Mississippi accomplished its about-face and change of theory in view of the lower court's action in the *City of Detroit* case, which was decided three and one-half months after the Examiner's decision and a full month after affirmance by the Commission itself. In a triumph of opportunism it advanced for the first time the "rate base" and "cost" concept in the Court of Appeals.

By virtue of the express provisions of § 19(b) of the Act, therefore, the court below did not have jurisdiction over the question decided by it as to the necessity of the Commission's determining that the prices paid by United to Union were justified by Union's costs of production. *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 US 492, 498-9 (1955); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785, 789 (CA 5 1956), cert. denied 352 US 968.

When this point was called to the attention of the Court of Appeals, that court inexplicably took the view that the objection had been raised by Mississippi in the Commission. This at any rate is the way we interpret the court's Footnote 1 at App. 2a which reads:

> "'The petitioner's application for rehearing specifically included this point. We do not read Federal Power Comm'n v. Colorado Interstate Gas Co., 348 U. S. 492, 99 L. Ed. 583, 75 S. Ct. 467 (1955), as requiring that the application for rehearing cite every case relied upon before the Court of Appeals."

The "this point" to which the footnote is appended is stated by the court thus (App. 2a):

> "Generally speaking, the features of the order which are attacked by Mississippi are: (1) The Commission allowed as a cost of service the full prices paid for gas by United to an affiliate wholly owned by a common parent; . . .

Now it is impossible to show that the objection ruled upon and accepted by the Court of Appeals was raised in the Commission or on petition for rehearing therein. Mississippi's specifications of error in the petition for rehearing contained the general statement (R. 952):

> "(1) The Commission erred in allowing in full in United's cost-of-service of the 100% affiliated gas purchase costs represented by United's purchases from Union Producing Company in certain major Northern and Gulf Coast Area gas fields."

Running through the discussion of alleged error in Mississippi's petition for rehearing under the title "Gas Purchase Costs" the Court will find *no specification* comparable to the objection dealt with by the Court of Appeals herein, but only a repetition of the argument originally made before

the Presiding Examiner that the *Panhandle* method was not properly applied (R. 955 quoted at p. 20 above).

Hence the "objection" (in the statutory language) was not in reality raised in the Commission at all; the observations of the Court of Appeals in dealing with the point are manifestly in error; and that court has disregarded the standard laid down by this Court in the *Interstate* case, 348 US at 499:

> "To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission."

While in some circumstances such an excess of jurisdiction might be treated as venial, we submit that the grave untoward consequences which the decision below entails in all future administrative procedure under the Natural Gas Act warrants the intervention of this Court.

CONCLUSION

The matters discussed above are believed to involve questions of federal law which individually are of such importance to the future administration and application of the Act that they should be settled by this Court. Petitioner submits that the decision below invades the statutory province reserved exclusively to the discretion and expertise of the Commission, and substitutes for the administrative discretion and judgment the judgment of the court, with its requirement for evidence and findings it deems appropriate for judicial determination.

It is believed that the court's decision nullifies and unreasonably interferes with the administrative process, and that the court below disregarded the admonition of this Court that:

> "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial

inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *FPC* v. *Hope Natural Gas Company* (1944) 320 US 591, 602).

It is accordingly urged that a writ of certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

THOMAS FLETCHER,
11th Floor Esperson Building,
Houston 2, Texas.

C. HUFFMAN LEWIS,
P. O. Box 1707,
Shreveport, Louisiana.

RALPH M. CARSON,
15 Broad Street,
New York, N. Y.

Attorneys for Petitioner
United Gas Pipe Line Company

WILBERT O. CRAIN,
General Counsel

GEORGE D. FISER,
P. O. Box 1407,
Shreveport, Louisiana

DAVIS POLK WARDWELL
SUNDERLAND & KIENDL,
15 Broad Street
New York, N. Y.

VINSON, ELKINS, WEEMS
& SEARLS,
11th Floor Esperson
Building,
Houston, Texas.

WILKINSON, LEWIS,
WILKINSON & MADISON,
P. O. Box 1707,
Shreveport, Louisiana
Of Counsel for Petitioner

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